

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 BORROUGHS CORPORATION and
5 BORROUGHS CORPORATION EMPLOYEE
6 BENEFIT PLAN

7 Plaintiffs.

8 v.

Case No. 11-12565

9 BLUE CROSS BLUE SHIELD OF MICHIGAN

10 Defendants.

11 and

12 HI-LEX CONTROLS INCORPORATED,
13 HI-LEX CORPORATION HEALTH AND WELFARE PLAN,

14 v.

Case No. 11-12557

15 BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

16 Defendants.

17 _____/

18
19 PLAINTIFF'S MOTION TO COMPEL DISCOVERY

20 BEFORE MAGISTRATE-JUDGE PAUL J. KOMIVES
21 United States District Judge
22 231 US Courthouse & Federal Building
23 635 Lafayette Boulevard West
24 Detroit, Michigan
25 Wednesday, April 11, 2012

1 APPEARANCES:

2
3 FOR THE PLAINTIFF: AARON M. PHELPS
4 PERRIN RYNDERS

5 FOR THE DEFENDANT: JASON R. GOURLEY
6 MICHAEL RECHTIEN

7
8 COURT RECORDER: EDDREY BUTTS

9
10 TRANSCRIBED BY:
11 Carol S. Sapala, RMR, FCRR
12 313.961.7552
13 www.transcriptorders.com
14
15
16
17
18
19
20
21
22
23
24
25

Plts. Second Motion To Compel Discovery 3-9-2012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

IDENTIFICATION	PAGE
WITNESSES	
None.	
Plaintiff's Second Motion to Compel Discovery	4
Certificate of Court Reporter	9

E X H I B I T S

IDENTIFICATION	RECEIVED
None	Marked

Plts. Second Motion To Compel Discovery 3-9-2012

1 Detroit, Michigan

2 Wednesday April 11, 2012

3 1:02 p.m.

4 (The transcriber was not present
5 at this hearing)

6 THE COURT: The Rule 30(b)(6) deposition that the
7 plaintiffs are desirous of taking, and it was noted that there
8 is a motion to quash with regard to that matter that is
9 scheduled for hearing on the 25th of April.

10 And so that issue, insofar as it appears on the motion
11 papers that are -- the motion to compel that is up today, is
12 kind of off the table for today and we'll have to await the
13 hearing on the 25th with regard to that motion to quash.

14 The other principle issue that is raised in the motion to
15 compel has to do with the plaintiff's desire to have the
16 defendant's conduct a search of their records with regard to
17 certain information that some 30 employees or former employees
18 of the defendant might, might, might have or relate to that
19 has to do with the access fee issue that's involved in this
20 case. That issue, of course, is ripe for argument and for
21 decision.

22 So at this time then I'll ask counsel, when they come
23 forward, to place their appearances on the record. And I will
24 ask counsel for the moving party.

25 And we have two plaintiffs here, Hi-Lex and Burroughs.

Plts. Second Motion To Compel Discovery 3-9-2012

1 And i would ask counsel for the plaintiffs to come forward to
2 the lectern to place his appearance on the file and to then
3 proceed with his presentation of his motion to compel.

4 Counsel?

5 MR. PHELPS: Thank you, Your Honor. Aaron Phelps on
6 behalf of plaintiffs. Also with me is Perrin Rynders.

7 Your Honor, as you stated, this is the plaintiff's second
8 motion to compel discovery. The issue today is our request
9 for production of communications likely to be principally any
10 communications discussing access fees.

11 The Court may recall from the prior hearing and the
12 briefing, the access fees are what the plaintiffs have alleged
13 were the hidden fees, hidden charges, that were charged to
14 them by Blue-Cross since 1994, not disclosed, not agreed to.

15 Naturally, as part of our initial discovery in this case,
16 back in September, we asked the defendant to produce
17 communications, whether they be with us or internally, that
18 discuss or relate to the access fees. Within that would be
19 included emails that discussed why that they chose to set
20 about this access fee scheme, why they initiated access fees
21 instead of including the fees on the bills, why the contracts
22 were changed the way they were, why they'd been changed over
23 time, emails about disclosure or nondisclosure.

24 Communications internally by Blue-Cross that perhaps
25 discuss whether the fees should be disclosed to customers, any

Plts. Second Motion To Compel Discovery 3-9-2012

1 of their customers, including the plaintiffs.

2 Perhaps there are admissions within those communications
3 where a Blue-Cross representative acknowledges that he or she
4 doesn't even know about the access fees or there's an internal
5 directive inside of Blue-Cross to not disclose the access
6 fees.

7 It is, frankly, hard to imagine communications and
8 documents that would be more relevant to this case, a case
9 about hidden access fees, then the very communications within
10 Blue-Cross that discuss those access fees.

11 This is actually the second hearing we've had on this
12 issue. At the first hearing, I believe it was early March, we
13 spent nearly three hours in a conference room, counsel for the
14 parties discussing this issue and trying to reach a resolution
15 short of a formal hearing.

16 And we came out and put on the record that we had reached
17 a framework for resolution; and the framework was that I would
18 provide a letter to opposing counsel detailing more
19 specifically the types of emails and communications we were
20 looking for.

21 The complaint we heard during the conference was that our
22 requests were too broad and too vague and so on. So they
23 asked for more specificity and we agreed to provide that,
24 which we did on March 16 in a three-page -- four-page letter
25 specifically identifying 37 topics.

Plts. Second Motion To Compel Discovery 3-9-2012

1 As part of our agreement at the last hearing, Blue-Cross'
2 counsel was supposed to review that and cooperate with us and
3 communicate with us on how we could go about getting these
4 communications.

5 Never has Blue-Cross responded to this letter. I've had
6 no communication with them regarding this issue. Despite the
7 fact that we spent all that time together, we came to an
8 agreement.

9 I put the work into doing a letter to try to reach a
10 resolution on this issue. They don't respond it to, they
11 haven't talked about it, they haven't offered any compromise,
12 haven't offered to provide any material that we have asked
13 for.

14 It appears at the last hearing it was simply a way to
15 delay this another several weeks, which was accomplished.
16 We're now five weeks later and we still don't have the emails
17 and communications we need.

18 Their response is principally two-fold. One is they say
19 these are not relevant. Two, they say it's too burdensome for
20 them to produce the emails.

21 While on the relevancy, I've already indicated the type
22 of documents that we want. They want to boil this case down
23 to, well, the only thing that's relevant is whether we
24 disclosed it. And we've given you the emails that show
25 whether we actually disclosed the fees to you.

Plts. Second Motion To Compel Discovery 3-9-2012

1 Well, the issue is, of course, much broader and much more
2 complicated then that. Because communications internally that
3 say not to disclose something would not have been provided to
4 us, would not have had a name on them, would not have been and
5 were not produced by Blue-Cross.

6 And, yet, clearly, an internal admission not to disclose
7 the access fees for an admission that they weren't disclosed,
8 admissions that customers didn't understand the access fees
9 would be clearly relevant.

10 In fact, we've taken one deposition of an account manager
11 related to the Hi-Lex case, a Blue-Cross Account Manager, and
12 that account manager testified that she didn't know for many
13 years that there were access fees.

14 The fees were not only hidden from us, the customer, they
15 were hidden from the Blue-Cross Account Managers themselves.

16 So the idea that the working group, the folks in charge
17 of this access fee program at Blue-Cross don't have
18 communications where they discuss how and to what extent and
19 whether to discuss these access fees is ludicrous. Of course
20 they do.

21 And clearly admissions on their part that they're not
22 disclosed, that people don't understand them would be highly,
23 highly relevant and probative to the issues in this case.
24 That's what the whole case is about.

25 So, again, they're not only directly relevant, but when

Plts. Second Motion To Compel Discovery 3-9-2012

1 you couple that with the, the broad civil discovery under the
2 Federal Rules under really any analysis, it's hard to imagine
3 how these are not at least discoverable, and in my view,
4 they're also clearly going to be admissible.

5 So that brings us then to their second and what I really
6 view is their final argument this idea that it's too
7 burdensome.

8 I'm sure -- it was in their response and I'm sure we'll
9 hear about it again today. We already heard about it a little
10 bit at our pre-hearing conference, on how Blue-Cross has so
11 many employees, 7,000 employees, they have tremendous amount
12 of email and this is, you know, terribly burdensome for them
13 to produce what we've asked for. There's really three
14 responses to that, Your Honor.

15 One is that large companies do not get a pass on civil
16 discovery. It doesn't matter how big you are, you still have
17 to do discovery, you still have to produce relevant material.

18 Frankly, what we had -- they are in a better position to
19 do this discovery than a smaller company. They have an army,
20 I'm sure of IT people and staff, who understands these issues
21 who can find these emails, can do the searches all internally.

22 Our clients have far fewer resources, less sophisticated
23 in the world of IT, but we've done the searches that they
24 want.

25 In some cases, our clients had to get additional software

Plts. Second Motion To Compel Discovery 3-9-2012

1 and add ons and things to do this, but we did it.

2 They asked us for emails, they gave us search terms. We
3 went, we performed searches, we provided documents. No
4 arguments from us on producing the documents that they've
5 requested.

6 So the simple fact that they're a large company is
7 irrelevant consideration regarding whether they actually have
8 to produce relevant material that they have.

9 Second, it wasn't apparently too burdensome for them to
10 do searches for the documents they wanted to find.

11 What was alluded to at our short conference before this
12 hearing was that they have done, in their view, a reasonable
13 search. They've provided the documents that they think are
14 relevant. Well, of course, that's not how discovery works.

15 I get to ask for the things that I want to prove my case,
16 and subject to supplementations, they have to provide the
17 documents that I have asked for.

18 They have flipped this completely around and they
19 unilaterally decided what they wanted to produce, the searches
20 they wanted to do. They went and did those and then produced
21 documents that they think help their case, or in some cases
22 are just benign, but that's what they came up with.

23 Absent from their production are -- I go as far as to say
24 any. I don't recall seeing any internal Blue-Cross
25 communications related to access fees. And they have archived

Plts. Second Motion To Compel Discovery 3-9-2012

1 they say every email in their system since 2004. Presumably
2 they have some emails prior to 2004. But at any rate, at
3 least they have every email since 2004.

4 And the idea that there was not some internal
5 communication among the work group on the access fees, among
6 the actuary folks, among the senior account managers and sales
7 managers about access fees, you know, is incredible. I mean
8 somebody came up with this program, somebody discussed it.
9 There was some internal communication.

10 Now, again, it wasn't widely disclosed in the company
11 because some of their account managers didn't know about it
12 and it certainly wasn't disclosed to the plaintiffs in these
13 cases.

14 But the upper level management types within Blue-Cross
15 certainly had some communication about it. There's none.
16 None of that has been produced. According to their papers,
17 they haven't even looked for that at all because it didn't
18 meet their criteria for what's relevant.

19 Your Honor alluded to the 30 or so folks that we've
20 identified. What that was was a compromise that we offered
21 Blue-Cross. They said, well, we have 7,000 employees. And we
22 said, well, no problem. You know you don't need to search
23 7,000 employees for relevant emails.

24 Based on your own documents, we know who the key people
25 are. Based on your own witness list, we know who the key

Plts. Second Motion To Compel Discovery 3-9-2012

1 people are.

2 And you take 7,000 and you funnel it down to really what
3 amounts to a handful, you know, around 30 folks, all of whom
4 were either account managers for us on their witness list as
5 having knowledge about the case or were identified in
6 documents as involved in some capacity with the access fee
7 program.

8 Then we said use the search terms you gave us, flip it
9 around. Your search terms, you use those and search all of
10 the emails and communications that relate to these 30 folks.
11 And they said no. They won't do that. It's too burdensome to
12 do that.

13 Well I don't know how that could be too burdensome when
14 they apparently searched all 7,000 employees to come up with
15 the emails that they did produce with their limited criteria.
16 So I fail to see why assertion 30 would be too burdensome.

17 Frankly, the options here are they just don't produce
18 anything that we've asked for, which is what they want. Or to
19 do this what I consider a pretty reasonable fair compromise
20 which is actually less than what some of our clients have
21 done.

22 Plaintiff Burroughs, for example, did a search of all 80
23 or so of their employees using their search terms.

24 So if Burroughs can do a search of 80 employees, then I
25 think Blue-Cross ought to be able to handle 30 but, again,

Plts. Second Motion To Compel Discovery 3-9-2012

1 that was a compromise. If they don't want to do that, then
2 fine, but you're still going to have to produce the documents.

3 If you don't want to use the reasonable search that we've
4 came up with, they can go through every one physically by hand
5 if they want, but they need to figure out a way that the Court
6 and we are satisfied is appropriate and captured all of the
7 relevant email and they need to produce them.

8 Timing is another critical issue, Your Honor. As
9 unfortunately you know, we asked for this -- these documents
10 back in September. We didn't actually figure out that they
11 had withheld this portion of email until around the First of
12 the year because they did produce some, so we were under the
13 impression they actually produced the email that we asked for.

14 When we figured out they had only produced what they
15 wanted to, you know, we, frankly, pretty immediately filed the
16 motion which led to the hearing in March. As I said, that was
17 delayed resolution based on their, you know, suggested
18 compromise which they had never followed up on.

19 Now here we are in the middle of April and we still have
20 these documents and discovery closes, I believe, in June and
21 we're being forced to take depositions without the benefit of
22 having these key documents.

23 So we ask that the Court order that that they immediately
24 produce the documents that have been requested, and we'd also
25 ask that the Court award costs and attorneys fees to

Plts. Second Motion To Compel Discovery 3-9-2012

1 plaintiffs to having to bring this motion for a second time.

2 Thank you.

3 THE COURT: I just -- are you through?

4 MR. PHELPS: Yes, I am.

5 THE COURT: I want to ask you one question, but I
6 don't -- are you through with your presentation?

7 MR. PHELPS: Yes, I am.

8 THE COURT: My question is this.

9 I think in your motion papers with regard to the
10 relevancy question, you do reference the fact that one of your
11 causes of action does involve intent. I think it's one of the
12 causes of action with regard to fraud, I think.

13 MR. PHELPS: Yes.

14 THE COURT: Because the, the comment was made in
15 opposition to the motion that, well, intent has nothing to do
16 with this case. But I think your position is well it does, at
17 least with regard to one cause of action.

18 Do I understand correctly what your position is?

19 MR. PHELPS: You understand part of the position on that
20 exactly, Your Honor. There's two specific reasons that's
21 relevant.

22 One is what you've outlined, that we do have a state
23 common law fraud claim that clearly has intent as an element.

24 And the judge in this -- Judge Roberts, has ordered us to
25 do discovery on these state law claims. We've pointed that

Plts. Second Motion To Compel Discovery 3-9-2012

1 out, read the order into the record the last time.

2 So there is a claim for discovery purposes for common law
3 fraud. Intent's an element. We need discovery on that.

4 In addition, though, under ERISA, the claims that are
5 presently pending before the Court that even Blue-Cross
6 acknowledges are pending, we have the statute of limitations
7 issue. They've asserted the statute of limitations as an
8 affirmative defense.

9 The statute of limitations -- the time period under that
10 federal statute depends on whether there has been fraud or
11 concealment.

12 So in order to apply the statute of limitations, the
13 Court will necessarily need to determine whether there's been
14 fraud on the part of Blue-Cross or whether there's been
15 concealment on the part of Blue-Cross.

16 So an element of the statute of limitations issue is also
17 to some degree intent or concealment, what was going on at
18 Blue-Cross and about this issue.

19 If there were emails where they said let's not disclose
20 the access fees or if somebody suggested we should make a
21 better disclosure of the access fees and somebody else at
22 Blue-Cross said, no, we don't want to do that, clearly that
23 goes right to the heart of concealment, fraud, and that's a
24 direct issue under both the ERISA federal claims and under the
25 state common law claim.

Plts. Second Motion To Compel Discovery 3-9-2012

1 THE COURT: Okay.

2 MR. PHELPS: And one last note that I was reminded of.
3 You made the comment earlier about some of these folks being
4 retired.

5 They weren't retired, of course, when they sent these
6 emails. They have the emails. The fact that some of these 30
7 folks are no longer with Blue-Cross is really an irrelevant
8 point because they, Blue-Cross, still has the emails that
9 those people sent while they were employees.

10 And, in fact, some of these former employees were on
11 their witness list, have been deposed, notwithstanding the
12 fact they're no longer employed there. So retired or not, the
13 emails exist and are relevant.

14 THE COURT: It's your motion, so you'll have a right of
15 rebuttal.

16 MR. PHELPS: Thank you, Your Honor.

17 THE COURT: I'll invite counsel for Blue Cross-Blue
18 Shield to come forward, place his appearances on the record
19 and to make his presentation with regard to this motion.

20 Counsel?

21 MR. GOURLEY: Morning, Your Honor. Jason Gourley on
22 behalf of Blue Cross-Blue Shield of Michigan. I also have
23 with me Matthew Rechtien.

24 Your Honor, I'd like to start by addressing the last
25 issue that Mr. Phelps addressed in response to your question

Plts. Second Motion To Compel Discovery 3-9-2012

1 about discovery with respect to a claim that might include
2 intent.

3 There was a lengthy discussion of how it was imperative
4 that you have discovery on this state law claim.

5 One thing that Mr. Phelps forgot to inform the Court is
6 that the state law claims have been dismissed in this matter.

7 So I don't know how he intends to get discovery on those
8 claims since they've been dismissed and Rule 26 does not allow
9 discovery of dismissed claims. So that issue, I think, is, is
10 taken care of just by that simple fact.

11 Secondly, I believe that Mr. Phelps realizes a little bit
12 on some revisionist history, so I'd like to just walk through
13 it a little bit.

14 This is not an instance where Blue-Cross has not done
15 anything to try to find the documents that Mr. Phelps has
16 requested. In fact, the opposite has happened.

17 We began this case, as he said, month and months ago.
18 And during -- since the case was initiated, plaintiffs have
19 engaged in what can only be perceived at least as a somewhat
20 oppressive approach to discovery and this is just the latest
21 step in that.

22 To date for Hi-Lex and Burroughs, they've served over 100
23 requests for admissions, 90 interrogatories, 200 requests for
24 production. Plus, if you count their most recent 30(b)(6)
25 notice which they also included a *duces tecum* request, that

Plts. Second Motion To Compel Discovery 3-9-2012

1 would be another 100 categories because the *duces tecum* had
2 58.

3 And then this is accommodation that Mr. Phelps referred
4 to that he gave to us after the last hearing featured 37 more
5 document requests. So we're pushing, you know, 350 document
6 requests.

7 Blue-Cross has done their best to respond to all of those
8 discovery requests to institute a search that produced the
9 documents that he was looking for.

10 I'm sure Your Honor's familiar with the search; we put it
11 in our papers. Blue-Cross started with 370 emails. They
12 instituted a search that targeted -- well, first of all, they
13 did a review of all the paper files for all of the individuals
14 involved in servicing the Hi-Lex and Burroughs account. That
15 would turn up the most relevant documents in this case, which,
16 of course, would be contract documents, communications back
17 and forth, give and take, quarterly settlements, annual
18 settlements and, also included disclosures of the access fees
19 in what's called Blue Reports where there's a pie chart that
20 specifically sets forth for a given year this is the amount of
21 access fees.

22 All of those documents were, were searched, found,
23 produced. In fact, those were produced with initial
24 disclosures. We didn't even wait for discovery requests. We
25 produced those early and that was a mutual agreement between

Plts. Second Motion To Compel Discovery 3-9-2012

1 the parties, but that was done very early on in the process.

2 In terms of the email search, Blue-Cross instituted to

3 search 370 emails. They targeted any documents that would

4 have been exchanged using searches for Hi-Lex and Burroughs.

5 Of course, that would show up in email address, names, so you

6 know it would be at Hi-Lex or at Burroughs. It included a

7 search of all of the main email accounts for the people who

8 serviced the Hi-Lex Burroughs account. That created universal

9 documents of 91 gigabytes.

10 We then did an intense review of all of those documents

11 and produced thousands of responsive documents.

12 Now also during that process, we narrowed the search by

13 using the set of key terms. It's interesting that Mr. Phelps

14 wants to rely on his use of the key terms as showing that his

15 search was reasonable because he used ours.

16 We, we used a set of terms, 12 I think, annual

17 settlement, annual renewal, value of blue, access fees, AAF.

18 These were all discussed with counsel; he knows them. It was

19 targeted to produce documents that, as he's searching for,

20 discussed anything having to do with access fees, charging,

21 disclosing, anything, that was done and that produced the

22 universe of documents that we've provided to counsel.

23 Now as to the relevancy argument, in his brief,

24 Mr. Phelps uses I think three basic areas to justify the

25 relevancy of documents internal to Blue-Cross that he claims

Plts. Second Motion To Compel Discovery 3-9-2012

1 might show a discussion of access fees or some sort of
2 nefarious scheme to hide them from customers and also to
3 justify his request for documents regarding access fees from
4 other Blue-Cross customers.

5 Those three things interestingly have one thing in
6 common; and that is, they're all limited to information
7 regarding the plaintiffs. He says the relevancy is supported
8 by these following facts or inquiries from him.

9 Blue-Cross charged access fees without prior
10 disclosure to or agreement from plaintiffs.

11 Blue-Cross did not fully disclose the amount
12 of access fees charged to plaintiffs.

13 And BCBS misrepresented access fees had not
14 been charged are reporting certain amounts
15 charged to plaintiffs as actual claims paid.

16 I think he hit on what our relevancy argument is. This
17 case, at the end of the day, deals with whether Blue-Cross,
18 under the contract, had the ability to charge the access fees.

19 Hi-Lex and Burroughs had knowledge of those access fees,
20 whether they continued to pay them after they had knowledge of
21 those access fees.

22 Now there was some discussion of, well we need this
23 discovery, Your Honor, because we have to respond to an early
24 motion for summary.

25 And in our meeting before the -- before the hearing, Your

Plts. Second Motion To Compel Discovery 3-9-2012

1 Honor brought up a point and asked -- you asked me I assume
2 your, your motion's going to focus on these disclosures that
3 you say were produced in your email search.

4 They're communications between Blue-Cross and Hi-Lex and
5 Burroughs where Blue-Cross discloses the access fees; you're
6 going to rely on that for your motion for summary. That is
7 true.

8 Now what's interesting is that any internal emails from
9 Blue-Cross between Blue-Cross individuals, that's not going to
10 be relevant to refuting whether or not the disclosures were
11 actually made.

12 I mean, the plain fact of the matter is the documents are
13 there. We're relying on actual documents, actual emails,
14 actual value blue reports that have the disclosures there.

15 Even if there was some sort of nefarious email or
16 something, which really I highly doubt there is because we've
17 done extensive searches, that email is irrelevant, if later on
18 down the road, Blue-Cross says here's the access fees or if
19 every Blue-Cross individual working on the Hi-Lex Burroughs
20 file says here, you know, here are the access fees for the
21 year.

22 In fact in this case, we have an internal document which
23 is called a Customer Confirmation Notice that was presented to
24 a Hi-Lex individual where specifically a Blue-Cross
25 representative discussed the fact that access fees were going

Plts. Second Motion To Compel Discovery 3-9-2012

1 to be charged, filled out a confirmation notice with Hi-Lex
2 representatives and they acknowledged that.

3 Now, you know, a wild goose chase into a conspire theory
4 to try to drum up all these emails is just not relevant.

5 I mean what's relevant is the communications with respect
6 to the access fees between the parties and we've tailored a
7 search that has produced those, those relevant documents.

8 Now in terms of burdensome, the search being burdensome,
9 first of all, Mr. Phelps just ignores the fact that we have
10 done a search already. Part of the reason the second search
11 is burdensome is because we've already done a search to
12 produce relevant documents.

13 And his argument is interesting but a bit circular. He
14 says, well they did it already so it can't be that burdensome,
15 so -- well do it again.

16 Well the original search was burdensome. I mean we, we
17 tried to institute a search that was as reasonable as we could
18 but it was still extremely burdensome. It took many, many
19 hours of time as well as, you know many, many hours of
20 attorney review.

21 We culled through 91 gigs of documents. It was not an
22 effort to avoid or obfuscate the discovery, it was the exact
23 opposite.

24 Now he's not happy with the results because, for the most
25 part, it turned up documents showing disclosure. And you know

Plts. Second Motion To Compel Discovery 3-9-2012

1 he claims, well, they only want to produce what is helpful to
2 them.

3 Well, you know, he wants what's helpful to him, we all
4 do, that's what litigation is about. Okay. But it doesn't
5 mean that he can get free range in discovery in the things
6 that are irrelevant.

7 Also what's interesting here is that I guess I'd like to
8 use his -- I'd like to use plaintiff's original search as a
9 baseline for an analysis of what a reasonable search in this
10 case is.

11 We also served discovery requests early in this case
12 seeking emails and electronic documents as well.

13 And we were originally notified by plaintiff's counsel
14 that their original search was to simply ask the principle
15 plaintiff's representatives to send them what they thought was
16 relevant. They didn't even do a search. They didn't use key
17 words, they just let the litigants themselves decide what was
18 relevant. Obviously, that was disconcerting to Blue-Cross.

19 So we -- when pressed, plaintiff's counsel also admitted
20 that given the way their email system was set up, that there
21 was a possibility that certain emails had been deleted because
22 if too many emails get on the system, it automatically deletes
23 them to make space. Again, we were wondering how is this --
24 how is our search not okay, but they're deleting emails and
25 that's okay.

Plts. Second Motion To Compel Discovery 3-9-2012

1 Then plaintiff's counsel also admitted they didn't do any
2 key word searches. We specifically had to request the key
3 word searches and the only searches they did were the ones
4 Blue-Cross had originally used on their own documents to
5 produce responsive documents to the plaintiff.

6 I mean three, four, five steps down the road, the only
7 meaningful search of plaintiff's documents happened because
8 they used the same search terms and same process they are now
9 opposing here. It was reasonable for them, but now they're
10 claiming -- for them to use it as a search, but now they're
11 claiming it's not reasonable either.

12 And on top of the fact that they're searching irrelevant
13 documents, I just don't think that it is appropriate for
14 Blue-Cross to bear yet another burden when it's not -- it
15 hadn't been reciprocated.

16 The reason a lot of this came up in the first place is a
17 lot of our concerns about their first search is that when we
18 got their document responses, that their documents -- response
19 to our requests, they didn't have many of the same
20 communications that were in our production to them.

21 Interestingly, some of them were emails that attached
22 Blue Reports or other documents that could be used to show
23 disclosure of the access fees. Now I don't know if that was
24 select production. Mr. Phelps has claimed maybe we had
25 selective production. We haven't. But it's, it's happened on

Plts. Second Motion To Compel Discovery 3-9-2012

1 both sides, that's what started this discussion in the first
2 place.

3 On top of that, you know, those documents that were
4 disclosed and not produced in Mr. Phelps' original set of
5 documents showing disclosure, he also happened to leave off
6 the complaint a valuable Blue Report that was attached to an
7 annual settlement that he did attach to the complaint. So
8 there's a little bit of gamesmanship maybe, but I think it's
9 important to look at it all on a broader level.

10 A couple of other things that I wanted to address. One
11 is the concept of seeking information about Blue-Cross's
12 dealings or access fee communications addressing access fees
13 with other customers.

14 Again I think this goes back to my original point and
15 that's that Blue-Cross' dealings with customers, first of all,
16 are proprietary, an important part of the business task force.

17 Blue-Cross don't necessarily want to open the doors to
18 other customers for lots of reasons, not the least of which is
19 maybe the other Blue-Cross customers don't want competitors or
20 other people seeing the documents.

21 But the other reason that we're particularly worried
22 about that in this case is that we conducted third-party
23 discovery through a subpoena to a third-party benefits agent.

24 And in response to that, received emails that showed that
25 Mr. Phelps was at least communicating with this third-party

Plts. Second Motion To Compel Discovery 3-9-2012

1 agent in an effort to find potential other plaintiffs for
2 these cases.

3 And you know on the face of it, it's not relevant but,
4 again adding on to that, the possibility that just using this
5 as an avenue to find additional plaintiffs, I mean, I just
6 don't think that it's proper.

7 Again that end of the day, whether Blue-Cross disclosed
8 access fees to Joe Blow down the street isn't going to win the
9 day for plaintiffs. It's going come down to, strictly
10 speaking, whether or not there was disclosure made to
11 Burroughs or to Hi-Lex. That same concept applies to the
12 statute of limitations argument.

13 I mean, whether there was, you know, whether there was
14 disclosure is going to be the key issue in triggering or not
15 triggering the statute of limitations and proving or not
16 proving fraudulent concealment.

17 We already produced documents to that extent. He has
18 them and those are the only relevant facts to that point.

19 So for those reasons, we would ask that the Court accept
20 the search that Blue-Cross's already performed and deny the
21 plaintiff's motion.

22 THE COURT: Thank you, counsel.

23 All right. Well, the motion is taken under advisement to
24 the extent that it deals with the Rule 30(b)(6) matter because
25 that's -- we'll await the motion to quash hearing on the 24th.

Plts. Second Motion To Compel Discovery 3-9-2012

1 The motion is granted with regard to remainder of the
2 motion. And that the order will provide that the discovery
3 should be furnished by the defendant -- that the discovery be
4 furnished -- would be discovery that was referred to in your
5 most recent letter to the defendant, so I will ask to you
6 check with my law clerk after the hearing to make sure that we
7 have a copy of that available.

8 I will not award any costs at this time, but we'll permit
9 the plaintiffs to renew requests for costs if the discovery
10 that's ordered is not provided by the defendant.

11 I'll put a time limit this will take some time to go
12 through this process. So I'll say 21 days for -- and that
13 the, the order, of course, will provide that the, the, the
14 parties as are white a square parties are quite aware
15 objections to the order can be lodged. If objections are
16 lodged, you have 14 days from receipt of the copy of order,
17 then it will be up to the district judge rule on those
18 objections. But that's the ruling of the Court.

19 In making that ruling, I conclude that under the
20 discovery rule of relevancy, whether it's relevant to a claim
21 or defense that the information being sought and being ordered
22 by the Court is relevant in two respects.

23 First to the question of intent with regard to the state
24 law cause of action involving fraud and also involving the
25 statute of limitations issue with regard to the ERISA claim.

Plts. Second Motion To Compel Discovery 3-9-2012

1 So that's my ruling. And I believe that it is -- it meets the
2 test of relevancy under the discovery rules.

3 And that I conclude at this time that I have not been
4 persuaded that there is an undue burden placed upon the
5 defendant to do this.

6 And, of course, the discovery being sought would be
7 sought by the defendant and in accordance with the search
8 terms that the defendant has previously provided to plaintiff
9 and that may be referred to in your most recent letter.

10 So that's the ruling of the Court. And so we'll try to
11 get an order out on this as quickly as possible. Okay.

12 Court's in recess at this time and the recording -- the
13 transcript will be placed -- not the transcript, but the
14 recording will be placed in the files and records of the
15 court. Thank you.

16 (Whereupon this hearing was then concluded at 11:13 a.m.)

17 CERTIFICATE OF TRANSCRIBER

18
19 I do hereby certify that the foregoing is a correct
20 transcription from the digital sound recording of proceedings
21 in the above-entitled matter on the date hereinbefore set
22 forth and has been prepared by me or under my direction
23 to the best of my ability.

24
25 s/Carol S. Sapala, FCRR, RMR

April 20, 2012